

James Madison, October, 1788. "Observations on the 'Draught of a Constitution for Virginia'". Transcription: The Writings of James Madison, ed. Gaillard Hunt. New York: G.P. Putnam's Sons, 1900-1910.

OBSERVATIONS ON THE "DRAUGHT OF A CONSTITUTION FOR VIRGINIA."1 MAD. MSS.

1 The paper is endorsed: "Remarks on Mr Jefferson's draught of a constitution—sent from N. York to Mr. Brown Octr. 1788—see his letters to J. M. on the subject." John Brown wrote to Madison July 7 and August 26, 1788, relative to a projected constitution for Kentucky, and in the latter letter said:—"also (if your leisure will permit) for some remarks upon Jefferson's plan of Govt. denoting such alterations as would render it more applicable to the District of Kentucky. These might be of the greatest consequence to that country."—*Mad. MSS.* The Jefferson draft may be seen in *Writings of Jefferson* (P. L. Ford), ii., 7.

Senate.

The term of two years is too short. Six years are not more than sufficient. A Senate is to withstand the occasional impetuosities of the more numerous branch. The members ought therefore to derive a firmness from the tenure of their places. It ought to supply the defect of knowledge and experience incident to the other branch, there ought to be time given therefore for attaining the qualifications necessary for that purpose. It ought finally to maintain that system and steadiness in public affairs without which no Government can prosper or be respectable. This cannot be done by a body undergoing a frequent change of its members. A Senate for six years will not be dangerous to liberty, on the contrary it will be one of its best guardians. By correcting the infirmities of popular Government, it will prevent that disgust agst that form which may otherwise produce a sudden transition to

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some very different one. It is no secret to any attentive & dispassionate observer of ye pol: situation of ye U. S., that the real danger to republican liberty has lurked in that cause.

The appointment of Senators by districts seems to be objectionable. A spirit of *locality* is inseparable from that mode. The evil is fully displayed in the County representations, the members of which are everywhere observed to lose sight of the aggregate interests of the Community, and even to sacrifice them to the interests or prejudices of their respective constituents. In general these local interests are miscalculated. But it is not impossible for a measure to be accommodated to the particular interests of every County or district, when considered by itself, and not so, when considered in relation to each other and to the whole State; in the same manner as the interests of individuals may be very different in a state

of nature and in a Political union. The most effectual remedy for the local bias is to impress on the minds of the Senators an attention to the interest of the whole Society, by making them the choice of the whole Society, each citizen voting for every Senator. The objection here is that the fittest characters would not be sufficiently known to the people at large. But in free governments, merit and notoriety of character are rarely separated, and such a regulation would connect them more and more together. Should this mode of election be on the whole not approved, that established in Maryland presents a valuable alternative. The latter affords perhaps a greater security for the selection of merit. The inconveniences chargeable on it are two: first that the Council of electors favors cabal. Against this the shortness of its existence is a good antidote, secondly that in a large State the meeting of the Electors must be expensive if they be paid, or badly attended if the service is onerous. To this it may be answered that in a case of such vast importance, the expence, which could not be great, ought to be disregarded. Whichever of these modes may be preferred, it cannot be amiss so far to admit the plan of districts as to restrain the choice to persons residing in different parts of the State. Such a regulation will produce a diffusive confidence in the Body, which is not less necessary than the other means of rendering it useful. In a State having large towns which can easily unite their votes the precaution would be

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essential to an immediate choice by the people at large. In Maryland no regard is paid to residence. And what is remarkable vacancies are filled by the Senate itself. This last is an obnoxious expedient and cannot in any point of view have much effect. It was probably meant to obviate the trouble of occasional meetings of the Electors. But the purpose might have been otherwise answered by allowing the unsuccessful candidates to supply vacancies according to the order of their standing on the list of votes, or by requiring provisional appointments to be made along with the positive ones. If an election by districts be unavoidable and the ideas here suggested be sound, the evil will be diminished in proportion to the extent given to the districts, taking two or more Senators from each district.

Electors.

The first question arising here is how far property ought to be made a qualification. There is a middle way to be taken which corresponds at once with the Theory of free Government and the lessons of experience. A freehold or equivalent of a certain value may be annexed to ye right of voting for Senators, & ye right left more at large in ye election of the other House. Examples of this distinction may be found in the Constitutions of several States particularly if I mistake not, of North Carolina & N. York. This middle mode reconciles and secures the two cardinal objects of Government; the rights of persons, and the rights of property. The former will be sufficiently guarded by one branch, the latter more particularly by the other. Give all power to property, and ye indigent will be oppressed. Give it to the latter and the effect may be transposed. Give a defensive share to each and each will be secure. The necessity of thus guarding the rights of property

was for obvious reasons unattended to in the commencement of the Revolution. In all the Governments which were considered as beacons to republican Patriots & lawgivers the rights of persons were subjected to those of property. The poor were sacrificed to the rich. In the existing state of American population & American property the two classes of rights were so little discriminated that a provision for the rights of persons was supposed to include of itself those of property, and it was natural to infer from the tendency

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of republican laws, that these different interests would be more and more identified. Experience and investigation have however produced more correct ideas on this subject. It is now observed that in all populous countries, the smaller part only can be interested in preserving the rights of property. It must be foreseen that America, and Kentucky itself will by degrees arrive at this stage of Society that in some parts of y Union a very great advance is already made towards it. It is well understood that interest leads to injustice as well where the opportunity is presented to bodies of men as to individuals; to an interested majority in a Republic, as to the interested minority in any other form of Government. The time to guard agst this danger is at the first forming of the Constitution, and in the present state of population when the bulk of the people have a sufficient interest in possession or in prospect to be attached to the rights of property, without being insufficiently attached to the rights of persons. Liberty not less than justice pleads for the policy here recommended. If *all* power be suffered to slide into hands not interested in the rights of property which must be the case whenever a majority fall under that description, one of two things cannot fail to happen; either they will unite against the other description and become the dupes & instruments of ambition, or their poverty & dependence will render them the mercenary instruments of wealth. In either case liberty will be subverted: in the first by a despotism growing out of anarchy, in the second, by an oligarchy founded on corruption.

The second question under this head is whether the ballot be not a better mode than that of voting viva voce. The comparative experience of the States pursuing the different modes is in favor of the first. It is found less difficult to guard against fraud in that than against bribery in the other.

Exclusions.

Does not The exclusion of Ministers of the Gospel as such violate a fundamental principle of liberty by punishing a religious profession with the privation of a civil right? does it [not] violate another article of the plan itself which exempts religion from the cognizance of Civil power? does it not violate justice by at once taking away a right and prohibiting a

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compensation for it? does it not in fine violate impartiality by shutting the door agst the Ministers of one Religion and leaving it open for those of every other.

The re-eligibility of members after accepting offices of profit is so much opposed to the present way of thinking in America that any discussion of the subject would probably be a waste of time.

Limits of power.

It is at least questionable whether death ought to be confined to "Treason and murder." It would not therefore be prudent to tie the hands of Government in the manner here proposed. The prohibition of pardon, however specious in theory would have practical consequences which render it inadmissible. A single instance is a sufficient proof. The crime of treason is generally shared by a number, and often a very great number. It would be politically if not morally wrong to take away the lives of all even if every individual were equally guilty. What name would be given to a severity which made no distinction between the legal & the moral offence—between the deluded multitude and their wicked leaders. A second trial would not avoid the difficulty; because the oaths of the jury would

not permit them to hearken to any voice but the inexorable voice of the law.

The power of the Legislature to appoint any other than their own officers departs too far from the Theory which requires a separation of the great Depts of Government. One of the best securities against the creation of unnecessary offices or tyrannical powers is an exclusion of the authors from all share in filling the one, or influence in the execution of the other. The proper mode of appointing to offices will fall under another head.

Executive Governour.

An election by the Legislature is liable to insuperable objections. It not only tends to faction intrigue and corruption, but leaves the Executive under the influence of an improper obligation to that department. An election by the people at large, as in this¹ & several other States—or by Electors as in the appointment of the Senate in Maryland, or, indeed, by the

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people through any other channel than their legislative representatives, seems to be far preferable. The ineligibility a second time, though not perhaps without advantages, is also liable to a variety of strong objections. It takes away one powerful motive to a faithful & useful administration, the desire of acquiring that title to a reappointment. By rendering a periodical change of men necessary, it discourages beneficial undertakings which require perseverance and system, or, as frequently happened in the Roman Consulate, either precipitates or prevents the execution of them. It may inspire desperate enterprises for the attainment of what is not attainable by legitimate means. It fetters the judgment and inclination

1 N. York, where these remarks were penned.—Madison's note.

of the Community; and in critical moments would either produce a violation of the Constitution or exclude a choice [which] might be essential to the public safety. Add to the whole, that by putting the Executive Magistrate in the situation of the tenant of an unrenovable lease, it would tempt him to neglect the constitutional rights of his department, and to connive at usurpations by the Legislative department, with which he may connect his future ambition or interest.

The clause restraining the first magistrate from the immediate command of the military force would be made better by excepting cases in which he should receive the sanction of the two branches of the Legislature.

Council of State.

The following variations are suggested. 1. The election to be made by the people immediately, or thro' some other medium than the Legislature. 2. A distributive choice should perhaps be secured as in the case of the Senate. 3. Instead of an ineligibility a second time, a rotation in the federal Senate, with an abridgmt of the term, to be substituted.

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The appointment to offices is, of all the functions of Republican & perhaps every other form of Government, the most difficult to guard against abuse. Give it to a numerous body, and you at once destroy all responsibility, and create a perpetual source of faction and corruption. Give it to the Executive wholly, and it may be made an engine of improper influence and favoritism. Suppose the power were divided thus: let the Executive alone make all the subordinate appointments, and the Govr and Senate, as in the Fedl Constn, those of the superior order. It seems particularly fit that the Judges, who are to form a distinct department should owe their offices partly to each of the other departments, rather than wholly to either.

Judiciary.

Much detail ought to be avoided in the Constitutional regulation of this Department, that there may be room for changes which may be demanded by the progressive changes in the state of our population. It is at least doubtful whether the number of Courts, the number of Judges, or even ye boundaries of Jurisdiction ought to be made unalterable but by a revisal of the Constitution. The precaution seems no otherwise necessary than as it may prevent sudden modifications of the establishment, or addition of obsequious Judges, for ye purpose of evading the checks of the Constn & givg effect to some sinister policy of the Legisre. But might not the same object be otherwise attained? by prohibiting, for example, any innovations in those particulars without the consent of that department: or without the annual sanction of two or three successive Assemblies, over & above the other pre-requisites to the passage of a law.

The model here proposed for a Court of Appeals is not recommended by experience. It is found as might well be presumed that the

members are always warped in their appellate decisions by an attachment to the principles and jurisdiction of their respective Courts, & still more so by the previous decision on ye case removed by appeal. The only efficient cure for the evil is to form a Court of Appeals, of distinct and select Judges. The expence ought not to be admitted as an objection 1.

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because the proper administration of Justice is of too essential a nature to be sacrificed to that consideration. 2. The number of inferior judges might in that case be lessened. 3. The whole department may be made to support itself by a judicious tax on law proceedings.

The excuse for non-attendance would be a more proper subject of enquiry somewhere else than in the Court to which the party belonged. Delicacy mutual convenience &c, would soon reduce the regulation to mere form; or if not, it might become a disagreeable source of little irritations among ye members. A certificate from the local Court or some other local authority where the party might reside or happen to be detained from his duty, expressing the cause of absence as well as that it was judged to be satisfactory, might be safely substituted. Few Judges would improperly claim their wages, if such a formality stood in the way. These observations are applicable to the Council of State.

A Court of Impeachments is among the most puzzling articles of a Republican Constitution; and it is far more easy to point out

defects in any plan than to supply a cure for them. The diversified expedients adopted in the Constitutions of the several States prove how much the compilers were embarrassed on this subject. The plan here proposed varies from all of them, and is perhaps not less than any a proof of the difficulties which pressed the ingenuity of its author. The remarks arising on it are 1. That it seems not to square with reason that the right to impeach should be united to that of trying the impeachment, & consequently in a proportional degree, to that of sharing in the appointment of, or influence on the Tribunal to which the trial may belong. 2. As the Executive & Judiciary would form a majority of the Court, and either have a right to impeach, too much might depend on a combination of these departments. This objection would be still stronger if the members of the Assembly were capable as proposed of holding offices, and were amenable in that capacity to the Court. 3. The H. of Delegates and either of those departments could appt a majority of ye Court. Here is another danger of combination, and the more to be apprehended as that branch of ye Legisl wd also have the right to impeach, a right in their hands of itself sufficiently weighty;

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and as the power of the Court wd extend to the head of the Ex, by whose independence the constltl rights of that department are to be secured agst Legislative usurpations. 4. The dangers in the two last cases would be still more formidable, as the power extends not only to deprivation, but to future incapacity of office. In the case of all officers of sufficient importance to be objects of factious persecution, the latter branch of power is in every view of a delicate nature. In that of the Chief Magistrate it seems inadmissible, if he be chosen by the Legislature; and much more so, if immediately by the people themselves. A temporary incapacitation is ye most that cd be properly authorised.

The 2 great desiderata in a Court of Impeachts are 1. impartiality. 2. respectability—the first in order to a right, the second in order to a satisfactory decision. These characteristics are aimed at in the following modification Let the Senate be denied the right to impeach. Let # of the members be struck out, by alternate nominations of the prosecutors & party impeached; the remaining # to be the *stamen* of the Court. When the H. of Del: impeach let the Judges, or a certain proportion of them—and the Council of State be associated in the trial, when the Govr or Council impeaches, let the Judges only be associated; when the Judges impeach let the Council only be associated. But if the party impeached by the H. of Dels

be a member of the Ex. or Judicy, let that of which he is a member not be associated. If the party impeached belong to one & be impeached by the other of these branches, let neither of them be associated the decision being in this case left with the Senate alone; or if that be thought exceptionable, a few members might be added by ye H. of Ds. # of the Court should in all cases be necessary to a conviction, & the Chief Magistrate *at least* should be exempt from a sentence of perpetual if not of temporary incapacity. It is extremely probable that a critical discussion of this outline may discover objections which do not occur. Some do occur; bur appear not to be greater than are incident to any different modification of the Tribunal.

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The establishment of trials by Jury & viva voce testimony in *all* cases and in *all* Courts, is, to say the least, a delicate experiment; and would most probably be either violated, or be found inconvenient.

Council of Revision.

A revisionary power is meant as a check to precipitate, to unjust, and to unconstitutional laws. These important ends would it is conceded be more effectually secured, without disarming the Legislature of its requisite authority, by requiring bills to be separately communicated to the Exec: & Judiciary depts If either of these object, let $\frac{3}{4}$ of each House be necessary to overrule the objection; and if either or both protest agst a bill as violating the Constitution, let it moreover be suspended notwithstanding the overruling proportion of the Assembly, until there shall have been a subsequent election of the H. of Reps and a re-passage of the bill by $\frac{2}{3}$ or $\frac{3}{4}$ of both Houses, as the case may be. It should not be allowed the Judges or ye. Executive to pronounce a law thus enacted unconstitutional & invalid.

In the State Constitutions & indeed in the Federal one also, no provision is made for the case of a disagreement in expounding them; and as the Courts are generally the last in making the decision, it results to them by refusing or not refusing to execute a law, to stamp it with its final character. This makes the Judiciary Dept paramount in fact to the Legislature, which was never intended and can never be proper.

The extension of the Habeas Corpus to the cases in which it has been usually suspended, merits consideration at least. If there be emergencies which call for such a suspension, it can have no effect to prohibit it, because the prohibition will assuredly give way to the impulse of the moment; or rather it will have the bad effect of facilitating other violations that may be less necessary. The Exemption of the press from liability in every case for *true facts* is also an innovation and as such ought to be well considered. This essential branch

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of liberty is perhaps in more danger of being interrupted by local tumults, or the silent awe of a predominant party, than by any direct attacks of Power.